SUPREME COURT, U. S.

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In The

SUPREME COURT of the UNITED STATES

October Term, 1968

Petition NOT PRINTED

No. 804

ROGER SCHULTER,

Petitioner,

v.

LEONARD F. RORAFF,
Judge, County Court Branch II,
La Crosse County, Wisconsin,

Respondent.

No. 804

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

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JURISDICTION

Respondent opposes the granting of the petition for a writ of certiorari to the Wisconsin Supreme Court on the ground that the facts of this case do not present any substantial question of the denial of constitutional rights in violation of the 5th, 6th, 14th or any other amendment to the United States Constitution.

QUESTIONS PRESENTED

Exception is taken to the untrue and misleading verbiage contained in the petitioner's statement of the "Questions Presented." Stripped of that verbiage the questions presented are:

1. Is the state barred from prosecuting the petitioner for his crimes merely because prior to the initiation of the criminal action against him, a coroner's inquest was held to investigate five violent traffic deaths and that inquest was then widely, but accurately, reported by area news media?

2. Although this petitioner has not been convicted of a violation of sec. 947.15, Wis. Stats., is that statute, which makes it a crime for an adult to intentionally encourage or contribute to the delinquency or neglect of a child and provides an increased penalty "if death is a consequence", unconstitutional as being arbitrary, unreasonable and overbroad in violation of the due process clause of the 14th Amendment, U. S. Const.?

STATEMENT OF THE CASE

This petition seeks review of the order of the Wisconsin Supreme Court affirming an order of the La Crosse County Circuit Court quashing an alternative writ of prohibition, which the petitioner had obtained to prevent the respondent, a magistrate, from proceeding with a criminal case against the petitioner.

On May 5, 1967 at about 11:30 p. m. on county trunk B in La Crosse county, Wisconsin, a collision occurred between two automobiles. As a result of this collision five people were killed. Those killed were Randall Mashak, 17, Robert Laxton, 17, Peter Cavadini, 17, Ronald Blashaski, 17, all of whom were in a car owned by petitioner, and Ernest Patterson, 27, a passenger in a car owned by Peter Fink.

In accordance with the mandate contained in sec. 966.01, Wis. Stats., an inquest into the deaths of the above named persons was called. Coroner James F. Murphy presided at the inquest, which was held on May 23, 1967 (R. 24). A coroner's jury was summoned in accordance with the provisions of sec. 966.02, Wis. Stats., and the district attorney of La Crosse county, Burleigh Randolph, appeared representing the state (R. 24). In further accordance with the provisions of sec. 966.01, Wis. Stats., District Attorney Randolph presented the evidence in this investigation into how five persons came to their deaths. Two of the witnesses, the petitioner and Elmer Blashaski, were present at the inquest with legal counsel. That counsel was allowed to participate to the extent authorized by sec. 966.065, Wis. Stats.

At the inquest testimony was given by Elmer Blashaski, an occupant of the petitioner's car; Peter Fink, the owner and operator of the second automobile involved in the collision; John Trussoni and Lanny Braithwaite, the surviving passengers in the Fink car; Howard Willstein, a motorcyclist who passed the Fink car shortly before the collision and three traffic officers. The coroner reported on the cause of death of the five victims and their blood alcohol content.

The petitioner was called as the first witness at the inquest. His counsel spoke for him. He stated that the petitioner desired to cooperate but was privileged not to testify; that an agreement had been entered into with the district attorney under which the petitioner would answer only certain questions and that he refuses to give any other testimony on the ground that it might tend to incriminate him (R. 25). The petitioner then testified only to the following; that his name is Roger Schulter; that he is 23 years of age and lives in Eastman, Wisconsin; that on May 5, 1967 he was the owner of a certain described automobile, which was involved in a collision at approximately 11:30 p. m. on county trunk B in La Crosse county; that Peter Cavadini was driving the car, with the petitioner's permission, at the time of the collision and that the petitioner was a passenger in the car (R. 25, 26).

Other testimony at the inquest brought forth the following facts about the deaths of the four boys and Ernest Patterson. Prior to 9:00 p. m. on May 5, 1967 the petitioner, a 23-year-old school teacher, had as passengers in his car the four 17-year-old boys and Elmer Blashaski, age 24. The petitioner drove this group to a tavern in West Salem (R. 28). The petitioner and Elmer Blashaski entered the tavern

and bought 43 bottles of beer. The petitioner and Elmer Blashaski provided the money to buy the beer (R. 28).

All of this beer was consumed by the occupants of the car (R. 29, 30). Each of the six, including the four 17-year-old boys, had about the same amount of beer (R. 29, 30). When the beer ran out, the petitioner stopped at the American Legion Club on French Island and he and Elmer Blashaski purchased a 24-bottle case of beer. This time the money for the beer was furnished by the four 17-year-olds (R. 33). Some of this beer was also consumed before the collision (R. 30).

After leaving the American Legion Club Room the group drove to the home of James Hemker. Hemker joined them. They, then, stopped at a drive-in to eat (R. 31) and, thereafter, each drank another beer (R. 32).

The collision occurred while Peter Cavadini, 17, was driving the petitioner's car and while the car was being driven from La Crosse towards West Salem (R. 32, 33). The petitioner was seated next to Cavadini in the front seat of the car (R. 33).

The second car involved in the collision was owned by Peter Fink, 28, a student at La Crosse State University (R. 35, 36). Fink and his friends, Ernest Patterson, 27, Lanny Braithwaite, 27, and John Trussoni, 26, had dinner at Syl's Place at Barre Mills (R. 35). During the evening of May 5 Fink had a highball at about 7:00 p. m., a drink about 10:00 p. m. and a drink with his meal (R. 36).

Fink and his friends left Syl's Place at about 11:00 p. m. and Fink was driving towards La Crosse. He was driving at a moderate speed and was in his proper lane

of travel (R. 36, 37; R. 38, 39; R. 40, 41; R. 42). The collision occurred in Fink's lane (R. 46, 49). Fink's passenger, Ernest Patterson, was killed as were the four boys in the Schulter car.

The coroner reported that the four 17-year-old boys and Patterson had died of various head, chest and neck injuries (R. 56, 57). The coroner also read to the jury the provisions of sec. 885.225, Wis. Stats., and reported on the blood alcohol content of each of the dead persons and of Fink (R. 57). Fink was not under the influence of intoxicants (R. 57). The blood alcohol content of the dead was as follows: Peter Cavadini, the driver of the petitioner's car, .142%; Robert Laxton, .102%; Randall Mashak, .13%; Ronald Blashaski, .11%; and Ernest Patterson, .10% (R. 57).

The coroner's jury returned a verdict that the four boys and Patterson came to their deaths "as a result of an automobile accident" (R. 59). The jury further found:

> "We, the undersigned jurors find the deaths of the above five people resulted from the negligent operation of the car driven by Peter Cavadini; that Peter Cavadini, a minor, had consumed beer furnished by Roger Schulter and Elmer Roy Blashaski; as a result of his consumption of that beer his blood alcohol level at the time of the collision, at about 11:38 P. M. on May 5th, 1967, was .142 mg. percent; that this blood alcohol level affected his ability to drive the Schulter car, therefore furnishing this beer was a cause of the death of the persons named; that a higher degree of negligence falls on Roger Schulter because he allowed this minor to drive his car under those conditions." (R. 59)

On May 26, 1967, after receipt of the verdict of the coroner's jury, a criminal complaint was made charging the petitioner with two counts of violation of sec. 947.15 (1) (a), Wis. Stats. (R. 9). The first count, a felony, alleged that the petitioner intentionally contributed to the delinquency of 17-year-old Peter Cavadini by furnishing him with fermented malt beverages and allowing Cavadini to drive his car while under the influence of intoxicants, which acts were a cause of the death of Cavadini and four others. The second count, a misdemeanor, was that the petitioner intentionally contributed to the delinquency of Randall Mashak, 17, Robert Laxton, 17, and Ronald Blashaski, 17, by furnishing them with fermented malt beverages (R. 9).

The petitioner and his attorney appeared before the magistrate, the respondent herein, on May 26. The magistrate, Judge Roraff, granted various continuances at the petitioner's request. On June 23 defense counsel filed a motion that the petitioner be charged under sec. 66.054 (20), Wis. Stats., instead of sec. 947.15, Wis. Stats., because the complaint allegedly did not contain sufficient allegations to charge a crime under sec. 947.15, Wis. Stats., which section it was also claimed was an unconstitutional statute (R. 15). Defense counsel, further, moved for dismissal of this complaint on the alleged ground that the publicity attendant to the inquest was such that the defendant could not receive a fair trial (R. 15).

On July 17, 1967 the respondent magistrate issued a decision and order denying the petitioner's motions. He found that he could not order a district attorney to charge a defendant with a crime that the defendant personally selects; that there was no merit in the defendant's claim that

the complaint did not allege sufficient facts to charge a crime under sec. 947.15, Wis. Stats.; that there was no merit to the claim that sec. 947.15, Wis. Stats., was unconstitutional and that although pre-trial publicity may be a ground for a change of venue, it was not a ground for the dismissal of criminal charges against the petitioner (R. 16-19). The magistrate, after denying the motions, set preliminary hearing on the felony charge for July 19, 1967 and ordered the misdemeanor charge held in abeyance until completion of the preliminary hearing (R. 20).

The petitioner's attorney on July 18, 1967 filed a petition for an alternative writ of prohibition with the La Crosse county circuit court (R. 4-8). An alternative writ was issued on July 18 against the magistrate, Judge Roraff, restraining further proceedings in the criminal case (R. 1). A return was made by Judge Roraff (R. 11-165). Arguments were heard and briefs submitted in which the claims of the petitioner were approximately the same as those made in support of his motion to Judge Roraff. The circuit court issued a decision in which it found that a writ of prohibition could not be issued since the magistrate had jurisdiction and the petitioner had an appropriate remedy by appeal or otherwise and that all of the petitioner's contentions were meritless (R. 167-168). It, therefore, signed an order quashing the alternative writ of prohibition and directing the magistrate, Judge Roraff, to proceed with the criminal action (R. 169, 170). The petitioner appealed from the circuit court order quashing the writ to the Wisconsin Supreme Court.

The Wisconsin Supreme Court also found that the petitioner's claims were meritless. Its decision in *State ex rel.*

Schulter v. Roraff is reported in 39 Wis. 2d 342, 159 N. W. 2d 25 and includes determinations that the state is not barred from prosecuting the petitioner for his crimes because of the publicity attendant to the inquest and that sec. 947.15, Wis. Stats., is a constitutional statute and is not arbitrary, unreasonable, indefinite or overbroad. Subsequently, a motion for rehearing was made and denied by the Wisconsin Supreme Court. The petitioner has now filed a petition for a writ of certiorari to the Wisconsin Supreme Court with this court.

ARGUMENT

I. No Substantial Federal Question Is Presented Because Not Only Was There No Violation Of Any Constitutional Rights Of The Petitioner Because Of The Inquest And Attendant Publicity, But Even If There Had Been Some Pre-Trial Violation Of His Rights The State Is Not Barred From Prosecuting Him For His Crimes.

There appears to be some variance between the petitioner's complaints as revealed by his "Questions Presented" and by his "Reasons For Granting Petition". In his first question, he asserts that the coroner's inquest and the publicity attendant thereto violated "substantial rights guaranteed to petitioner by the Amendments V, VI and XIV to the Constitution of the United States". In his "Reasons For Granting Petition", however, he claims that the inquest and publicity violated his right "to have a fair trial". Both of these claims are completely meritless, but even if true they would not support a barring of the state from prosecuting the petitioner for his crimes.

A. *A coroner's inquest is not unconstitutional per se and there was no violation of any of the petitioner's rights during this inquest*

Five persons met violent deaths in the automobile collision of May 5, 1967. The statutes of Wisconsin, Chap. 966, require a coroner's inquest under such circumstances. A coroner's inquest is an investigation. It is not a criminal prosecution. It is not only an investigation required by statute, but it is a type of investigation which existed at common law. The office of coroner, the chief duty of which is to hold inquests, is a very ancient office. It existed long before the time of the adoption of the United States Constitution and has continued, with statutory modifications, in most jurisdictions. See 18 C. J. S., Coroners, § 2, § 12, § 13, pp. 288, 292, 293.

The petitioner asserts that a coroner's inquest is unconstitutional *per se*. He has no authority for this surprising claim, but asserts that it is so because of various complaints which could more appropriately be made against grand jury proceedings. The grand jury, of course, is a method of investigation and initiation of criminal proceedings, which is specifically referred to in the 5th Amend., U. S. Const. Until such time as grand juries are unconstitutional *per se*, there is absolutely no basis for claiming that coroner's inquests are unconstitutional *per se*.

The Wisconsin Supreme Court disposed of this claim by the petitioner in *State ex rel. Schulter v. Roraff* (1968), 39 Wis. 2d 342, 350, 351, 159 N. W. 2d 25, in the following manner:

"He also claims an inquest is per se unconstitutional because it is an official proceeding without rules, run by the district attorney, because the witness' counsel cannot examine his client or cross-examine other witnesses or argue before the presiding person and it results in a premature official finding of guilt. Although an inquest must find the cause of the death and who is responsible, sec. 966.09, Stats., it is primarily and in nature an investigative tool like a John Doe proceeding under sec. 954.025, or a grand jury proceeding under sec. 255.10, both of which may result in a formal charge of crime being made. There is no doubt that due process must be afforded in an inquest as in all other proceedings affecting the rights of individuals. *Ekern v. McGovern* (1913), 154 Wis. 157, 142 N. W. 595; *State v. Stehlek* (1953), 262 Wis. 642, 56 N. W. 2d 514. We do not think an inquest is per se unconstitutional. In the manner of conducting an inquest, a witness may have a legitimate constitutional complaint."

This conclusion is clearly a correct one.

The question, then, is whether this petitioner has any legitimate constitutional complaint about the manner in which this particular inquest was conducted. Since an inquest is an investigation, this petitioner has the same constitutional rights which he would have in any other investigation. These rights are his right against self-incrimination and his right to the advice and assistance of counsel. Both of these rights were fully recognized and respected in this coroner's inquest (R. 25). As found by the Wisconsin Supreme Court, *State ex rel. Schulter v. Roraff* (1968), 39 Wis. 2d 342, 352, 159 N. W. 2d 25:

"Factually, the record does not disclose such a drastic invasion of Schulter's rights as he claims. At

the inquest he was represented by counsel and he exercised his right against self-incrimination."

Many, many complaints about the inquest, most of which are completely unjustified or immaterial, are found in this petition and were made to the Wisconsin courts. The petitioner, for example, complains that the coroner was his personal physician; that the inquest was public; that the district attorney played a major role at the inquest and that the verdict "branded" him "as a felon". The facts are, however, that the coroner in no way violated any doctor-patient confidential relationship; that an inquest is a public proceeding and should not be held in private; that the district attorney performed his duties as outlined in the statutes and that the verdict (R. 59) did not "brand" him as a "felon" or find him guilty of any crime.

Despite his vehement protests, the petitioner is not actually unhappy with either the inquest as an investigative proceeding or with the method of conducting this particular inquest. *He is unhappy with the facts shown by the inquest.* He would have been most delighted with the inquest, which is a kind of screening device for criminal prosecutions, if it had failed to bring forth the true facts. If, for example, Elmer Blashaski had refused to testify, in all likelihood the true facts would never have been revealed with sufficient clarity to bring a criminal prosecution.

The constitutional rights of this petitioner, i.e. the right against self-incrimination and the right to the advice and assistance of counsel, were scrupulously protected in this inquest.

B. *Since the petitioner has so far succeeded in preventing a trial, he has not been denied his right to a fair trial because of pre-trial publicity*

The inquest in this case was held on May 23, 1967 (R. 24), which is well over a year and a half ago. The inquest was a public proceeding and was attended by representatives of the local mass media. In accordance with their constitutional rights, the news media did report on the inquest. The violent deaths of five young men and an inquest into those deaths are, of course, of public interest and very newsworthy.

As recognized by the petitioner on page 8 of his petition, the reporting was not irresponsible. Despite this fact, the petitioner asserts that the publicity from the inquest was such that it violated his right "to have a fair trial". His claim, of course, is entirely premature because he has succeeded in preventing the criminal action against him from proceeding beyond the point of his initial appearance before the magistrate, who is the respondent herein. He has had no trial and it is, therefore, impossible for him to have been denied his right "to a fair trial".

The constitutional right to a fair trial is not denied by the mere fact that there is pre-trial publicity. As pointed out by this court in *Beck v. Washington* (1962), 369 U. S. 541, 556, pre-trial publicity is beside the point, since the question is whether the petitioner "actually received a trial before an impartial jury". Cf: *Stroble v. California* (1952), 343 U. S. 181, 193, 194, 195.

This court does not and should not grant certiorari on the basis of mere speculation regarding whether, if the peti-

tioner had been tried, he would have been denied a fair trial before an impartial jury.

C. *Even if there had been some pre-trial violation of the petitioner's rights, the state is not barred from prosecution of him for his crimes*

The respondent herein ruled that "prejudicial publicity may be grounds for a change of venue but not for dismissal" (R. 19). The Wisconsin Supreme Court held in this case, 39 Wis. 2d 342, 351:

> "The standard remedies for pretrial prejudice available to Schulter are not inadequate on the facts. The inquest, although conducted by the district attorney on behalf of the state and resulting in publicity, stands on no different footing in respect to prejudicial pretrial publicity than other pretrial activity. It is not the source of pretrial publicity which determines the prejudice and the remedy but the nature, amount and the effect of such pretrial publicity. It is claimed the inquest was unnecessary, held for the purpose of publicity and was prejudicial in resulting in a finding of guilt. If true, Schulter is entitled to relief but not necessarily the dismissal of the charges.
>
> "In *State v. Woodington* (1966), 31 Wis. 2d 151, 142 N. W. 2d 810, 143 N. W. 2d 753, we considered the problem of pretrial publicity and concluded the remedy was not necessarily the dismissal of charges but a change of venue or a continuance of the trial and the careful selection of the jury on *voir dire*."

The *Woodington* case, mentioned in the above quotation, has been considered by this court. In *Woodington v. Wisconsin* (1967), 386 U. S. 9 this court dismissed an appeal

and denied a petition for certiorari which was grounded, in part, on a claim that the criminal action against the appellant-petitioner should have been dismissed because of the pre-trial conduct of agents of the state in generating pre-trial publicity. The action of this court in *Woodington* also dictates that this petition for certiorari be denied.

In the present case, there was absolutely no pre-trial violation of any constitutional rights of the petitioner. Even if there had been, however, his remedy is not the barring of the state from prosecution of him for his crimes. In *United States v. Blue* (1966), 384 U. S. 251 it was claimed that prosecution was barred because of a pre-trial violation of the defendant's rights under the 5th Amendment. This court rejected that claim and in so doing reversed the lower federal court. It wrote, p. 255:

> "* * * Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book."

There is even more reason in the present case for so holding because here there is no violation of the petitioner's rights other than that allegedly occasioned by responsible pre-trial publicity. If local pre-trial publicity can result in the state being barred from prosecuting offenders for their crimes, no criminal whose crime or victim or identity is newsworthy can be prosecuted. One can with absolute immunity murder a president of the United States or any

other prominent person or commit any other crime of sufficient uniqueness or interest to attract the legitimate interest of even local news media.

As pointed out repetitively by all of the lower courts which considered this petitioner's meritless claims, the remedies for prejudicial pre-trial publicity are change of venue, continuance and careful selection of the jury on *voir dire*. If by any chance these are inadequate and the petitioner, if and when tried and convicted, was, in fact, denied a fair trial before an impartial jury, the remedy is reversal of the conviction and a new trial. See, for example, *Sheppard v. Maxwell* (1966), 384 U. S. 333.

The petitioner's claims are meritless and not worthy of consideration by this court since no substantial federal question is presented.

II. The Alleged Unconstitutionality Of Sec. 947.15, Wis. Stats., Does Not Present A Substantial Federal Question.

There is a strong presumption of constitutionality of all statutes.

> *United States v. National Dairy Corporation* (1963), 372 U. S. 29, 32;
>
> *State v. Woodington* (1966), 31 Wis. 2d 151, 181, 142 N. W. 2d 810, 143 N. W. 2d 753, appeal dis. and cert. den. 386 U. S. 9.

In light of this presumption and, further, considering that this petitioner has not yet been charged by information with a violation of the statute and has not yet been

tried or convicted of a violation of it, it appears doubtful that the constitutionality of the statute presents a "substantial" federal question.

The constitutionality of sec. 947.15, Wis. Stats., the provisions of which are found in petitioner's Appendix A, was, however, challenged before the respondent, the circuit court and the Wisconsin Supreme Court. All of the petitioner's claims were considered and rejected by all of these courts.

Rather than to spend time on again answering the petitioner's patently meritless claim that the statute is unconstitutional because it is allegedly arbitrary, unreasonable, indefinite and overbroad, these claims have all been succinctly answered by the Wisconsin Supreme Court. It wrote of the petitioner's claims, *State ex rel. Schulter v. Roraff* (1968), 39 Wis. 2d 342, 355, 356, 159 N. W. 2d 25:

> "It is claimed sec. 947.15, Stats., is unconstitutional because it is arbitrary, unreasonable, indefinite and overbroad. It is specifically argued that the statute increased the penalty for contributing to the delinquency of a child from that of a misdemeanor to the punishment of a felony if death is a consequence of the delinquency. It is argued this increased penalty has no substantial relationship to the purpose sought to be accomplished by the section and there is no requirement of a criminally relevant connection between the delinquent acts and the death such as foreseeability, a dangerous activity, or a felonious act. What punishment is to be related to a particular crime is within the province of the legislature and the relating process is governed by the constitution to the extent no cruel and inhuman punishment is permitted and due process and equal protection are afforded.

"We think the consequences of the act and their seriousness may be a proper consideration in fixing the severity of the punishment. Foreseeability or intent that the specific consequences occur are not necessary to due process or to a crime. Acts which result in death frequently carry increased penalties over the same act which does not result in death, *i.e.*, sec. 940.03, Stats., felony murder. We think there is sufficient connection even if it is only causation between the proscribed act of contributing to the delinquency of a child and death resulting from such delinquency to make an increased penalty reasonable and not arbitrary even though death is unintended or unforeseen.

"The claim that sec. 947.15, Stats., is vague, overbroad, and indefinite is without merit. In *State v. Woodington, supra*, we stated the criminal statute met the test of reasonableness and definiteness if it fairly informed an ordinary person who is subject to it what acts are prohibited and will render him liable to penalties. *See also State v. Alfonsi* (1967), 33 Wis. 2d 469, 147 N. W. 2d 550; *State v. Givens* (1965), 28 Wis. 2d 109, 135 N. W. 2d 780; *State v. Evjue* (1948), 253 Wis. 146, 33 N. W. 2d 305."

CONCLUSION

There are no special and important reasons for granting the petition for certiorari in this case. The Wisconsin Supreme Court has not decided a federal question of substance, which has not heretofore been determined by this court and its decision is in accord with applicable decisions of this court.

It is, therefore, respectfully submitted that the petition for a writ of certiorari to the Wisconsin Supreme Court be denied.

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